

BISI JINGGOT

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v.

**SUPERINTENDENT OF LANDS AND SURVEYS
KUCHING DIVISION & ORS**

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COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
AZHAR MA'AH JCA
[CIVIL APPEAL NO: Q-01-100-2008]
18 JANUARY 2012

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LAND LAW: Customary land - Native Customary Rights (NCRs) - Claim for - Whether appellant acquired NCRs over parcels of land - Whether individual customary rights transferable by sale or otherwise for value - Whether customary law allows for sale or transfer of land to another individual outside the community or district - *Sumbang Sekam v. Engkarong Ajah*

D

NATIVE LAW AND CUSTOM: Declaratory order - Application for - Land dispute - Native Customary Rights (NCRs) - Whether appellant acquired NCRs over parcels of land - Whether individual customary rights transferable by sale or otherwise for value - Whether customary law allows for sale or transfer of land to another individual outside the community or district - *Sumbang Sekam v. Engkarong Ajah*

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NATIVE LAW AND CUSTOM: Land dispute - Native Customary Rights (NCRs) - Whether appellant acquired NCRs over parcels of land - Whether individual customary rights transferable by sale or otherwise for value - Whether customary law allows for sale or transfer of land to another individual outside the community or district - *Sumbang Sekam v. Engkarong Ajah*

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The appellant, an Iban by race and a native of Sarawak, claimed he had acquired native customary rights ("NCR") over several plots of land. The appellant further contended that as NCR lands are untitled, the appellant's right was proven by cultivation, farming and/or occupation. This, according to the appellant, was in accordance with the native customary laws of his community *ie*, the Iban Community. The appellant filed an action against the respondents in the High Court claiming for, *inter alia*: (i) a declaration that he had acquired NCR over the plots of land; and (ii) a declaration that his rights precluded the first, second, third

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- A and fourth respondents from impairing or abridging his rights. The first and second respondents, however, denied that there were any native customary rights created or acquired prior to 1 January 1958 by any persons over the said parcels of land. The Judicial Commissioner (“JC”), in dismissing the appellant’s action, held that
- B the appellant had not adduced any evidence of any customary practice that enabled a native holding land under NCR to ‘transfer’ his land or rights thereunder to a third party. Dissatisfied, the appellant appealed.
- C **Held (dismissing appellant’s appeal with costs)**
Per Azhar Ma’ah JCA delivering the judgment of the court:
- (1) In the case of *Sumbang Sekam v. Engkarong Ajah*, the Native Court of Appeal held that “individual customary rights are not transferable by sale or otherwise for value”, which was
- D followed by *Sat anak Akum & Anor v. Randong ak Charareng*. The above decisions by the Native Court of Appeal, the highest court in the Native Court system in Sarawak, was the reflection of the *adat* and custom or body of customs to which the law of Sarawak gives effect. There are regulations and
- E administrative procedures laid down by the government pertaining to disposal of NCR land. By the provisions provided, the transfer of land held under native customary tenure must be approved by the Village Council. (paras 11, 12 & 15)
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- (2) The appellant in this appeal was from Julau and his parents came from the same place. However, the land claimed by the appellant to have been acquired by way of sale and purchase agreements were at Sungai Agas, Matang, Kuching. This was
- G thus a case of an Iban from a community in Julau (Central Sarawak) acquiring native customary rights from a community in Kuching District (Western Sarawak). In light of what had been decided by the Native Court, this court was legally bound to take judicial notice of the customary law that had been clearly and consistently established by the aforementioned
- H judgment of the Native Court of Appeal in Sarawak with the bottom line that individual customary rights created or acquired by natives through the practice of their customs could not be transferred for value or to someone from outside
- I their community or district. (paras 16 & 20)

Bahasa Malaysia Translation Of Headnotes

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Perayu, yang berbangsa Iban dan berasal dari Sarawak, mendakwa bahawa dia telah memperolehi hak tanah adat (“HTA”) ke atas beberapa bidang tanah. Perayu juga menghujahkan bahawa oleh kerana tanah-tanah HTA tak bermilik, hak perayu terbukti melalui oleh penanaman, pertanian dan/atau pendudukan. Ini, menurut perayu, adalah selaras dengan undang-undang adat masyarakatnya iaitu masyarakat Iban. Perayu memfailkan tindakan terhadap responden-responden di Mahkamah Tinggi menuntut, antara lain: (i) satu pengisytiharan bahawa dia telah memperolehi HTA atas plot-plot tanah tersebut dan (ii) satu pengisytiharan bahawa hak-haknya menghalang responden-responden pertama, kedua, ketiga dan keempat daripada merosakkan atau mengurangkan hak-haknya. Responden pertama dan kedua, walau bagaimanapun, menafikan bahawa terdapat apa-apa hak adat yang dibentuk atau diperolehi sebelum 1 Januari 1958 oleh mana-mana pihak ke atas bidang-bidang tanah tersebut. Pesuruhjaya Kehakiman (“PK”), dalam menolak tindakan perayu, memutuskan bahawa plaintif gagal mengemukakan apa-apa keterangan berkenaan amalan adat yang membenarkan seseorang anak negeri memegang tanah di bawah HTA untuk “memindahkan” tanahnya atau hak-haknya kepada pihak ketiga. Tidak berpuas hati, perayu merayu.

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Diputuskan (menolak rayuan perayu dengan kos)

Oleh Azhar Ma’ah HMR menyampaikan penghakiman mahkamah:

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- (1) Dalam kes *Sumbang Sekam v. Engkarong Ajah*, Mahkamah Rayuan Anak Negeri memutuskan bahawa “hak adat secara individu tidak boleh dipindahkan melalui jualan atau sebaliknya untuk suatu nilai,” yang diikuti oleh *Sat anak Akum & Anor v. Randong ak Charareng*. Keputusan-keputusan tersebut oleh Mahkamah Rayuan Anak Negeri, mahkamah tertinggi dalam sistem Mahkamah Anak Negeri di Sarawak, mencerminkan ‘adat’ dan custom atau perbadanan adat di mana undang-undang Sarawak memberi kesan. Terdapat peraturan dan prosedur-prosedur pentadbiran yang dibentangkan oleh kerajaan yang berkaitan dengan penjualan tanah HTA. Dengan peruntukan-peruntukan sedia ada, pindahtanah yang dipegang di bawah tempoh adat harus diluluskan oleh Jawatankuasa Kampung.

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- A (2) Perayu dalam rayuan ini berasal dari Julau dan ibu bapanya juga berasal dari tempat yang sama. Walau bagaimanapun, tanah yang dituntut oleh perayu yang menurutnya diperolehi melalui perjanjian jual beli adalah di Sungai Agas, Matang, Kuching. Oleh itu, ini adalah kes seorang Iban daripada masyarakat di Julau (Sarawak Tengah) memperolehi hak tanah adat daripada masyarakat di Daerah Kuching (Sarawak Barat). Berdasarkan apa yang telah diputuskan oleh Mahkamah Anak Negeri, mahkamah ini terikat di sisi undang-undang untuk menggunakan pengiktirafan kehakiman undang-undang anak negeri yang telah dengan jelas dan konsisten ditetapkan oleh penghakiman Mahkamah Rayuan Anak Negeri Sarawak tersebut dengan kata putus bahawa hak adat individu yang dibentuk atau diperolehi oleh anak-anak negeri melalui amalan adat mereka tidak boleh dipindahmilik untuk nilai atau kepada sesiapa yang berada di luar masyarakat atau daerah mereka.
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Case(s) referred to:

Gawon anak Gudun & 2 Ors v. G Gujal & Rose (f) Buso (OS No. 25 of 1977) (Unreported) (refd)

Sat anak Akum & Anor v. Randong Charareng [1958] SCR 104 (refd)

- E *Sumbang Sekam v. Engkarong Ajah [1958] SCR 95 (refd)*

Legislation referred to:

Federal Constitution, arts. 74(2), 95B(1)(a), 121

Land Code Sarawak, ss. 5(2), 10, 202

- F *For the appellant - Mekanda Singh Sandhu (Kalveet Singh Sandhu & Satinder Singh Sandhu with him); M/s Sandhu & Co*
For the 1st & 2nd respondents - JC Fong (Saferi Ali with him); State Legal Officer
For the 3rd respondent - Abang Halit Abang Malik; M/s Loke, King, Goh & Partners
- G *For the 4th respondent - Bexter Michael; M/s EE & Lim*

[Editor's note: For the High Court judgment, please see Bisi Jinggot v. Superintendent Of Lands And Survey Kuching Division & Ors [2008] 5 CLJ 606]

- H *Reported by Suhainah Wahiduddin*

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JUDGMENT**A****Azhar Ma'ah JCA:**

[1] This is an appeal against the decision of the High Court of Sibu delivered on 30 April 2008 wherein the appellant's claim against the respondents was dismissed with no order as to costs.

B**Factual Matrix**

[2] The appellant (plaintiff in the court below), an Iban by race and native of Sarawak, claimed that he had acquired native customary rights (NCR) over three different areas and category of lands listed as follows:

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(i) 8 parcels of Native Customary Land (NCL) totalling approximately 37.24 acres at Sungai Agas, 13th Mile, Matang, by virtue of eight sale and purchase agreements which he had entered into with various persons who themselves had acquired native customary rights over the said parcels of land by virtue of Iban customs.

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(ii) Lot 34 measuring 2.94 acres marked and shaded green on the map attached to the statement of claim which in 1986 was cultivated with cocoa under a Cocoa Scheme and thereafter in 1991 turned into cattle rearing farm under SEDC Adoption Scheme.

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(iii) Lots 1, 2 and 3 (34 acres) shaded red on the said map, by virtue of a letter of authority issued by the Forest Department, Sarawak to Pet Rocks Malaysia, a firm wholly owned by the appellant to extract logs or timber therefrom.

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[3] On or about April 1993, the first and second respondents issued out two issue documents of title known as Lot 85 and Lot 86, both of Block 1, Matang Land District in favour of the fourth respondent. The said issue documents of title were in respect of areas which cover and/or include the aforementioned plots of land claimed by the appellant.

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[4] The appellant's complaint is that, by reason of the issuance of the documents of title to the fourth respondent, his NCR over the plots in question had been impaired and abridged and as such it is null and void in law.

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- A [5] Insofar as the third respondent is concerned, the appellant alleges that the former representing the scouts movement in Sarawak had trespassed onto the said land and thereby causing extensive damage to the property, and thus he claims compensation for these damage.
- B [6] In making the above claims, the appellant contends that the laws of Sarawak, in particular, the Sarawak Land Code 1958 (SLC) and its predecessors had recognised NCR over lands. The appellant further contends that as NCR lands are untitled, the claimant's right is proven by cultivation, farming and/or occupation.
- C This, according to the appellant, is in accordance with native customary law of his community ie, Iban community. The appellant having fulfilled these conditions is legally entitled to assert his NCR over the lands in question. It is further contended that
- D alienation of these lands to any person such as the fourth respondent cannot be done unless NCR had been extinguished, surrendered or compensation had been paid to the owners of such land. In the instant case, no extinguishment had been made or exercised by the first and second respondents over the land in question; nor was there any compensation paid to the appellant.
- E [7] Following the aforementioned events alleged to have taken place, the appellant filed an action in the High Court claiming against the respondents *inter alia*:
- F (a) a declaration that he has acquired customary rights (NCR) over the said first and/or second and/or third plots of land;
- (b) a declaration that his rights precludes the first, second, third and fourth respondents from impairing or abridging his rights;
- G (c) a declaration that the areas of land over Lots 85 and 86, Block 1, Matang Land District issued to the fourth respondent, in as far as those areas encroach onto his said plots of land is null and void to that extent;
- H (d) a declaration that the third respondent and/or its servants or agents had trespassed onto the said plots of land;
- (e) general exemplary and aggravated damages.

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[8] In response to the appellant's claim above, the first and second respondents stated their defence as follows: A

- (i) The first and second respondents deny that there were any native customary rights created and/or acquired prior to the first day of January 1958 by any persons over the parcels described in paras. 4(a) and (b) of the statement of claim and such rights still subsist. B
- (ii) The first and second respondents say that no permit was issued under s. 10 of the Land Code (Cap. 81) of Sarawak or any other written law to any person to occupy and exercise any rights or privileges over the parcels described in paras. 4(a) and (b) of the statement of claim. C
- (iii) Prior to 1 January 1958, native customary rights were recognised only in respect of matters set out in the Land Settlement Ordinance (Cap. 26) of Sarawak. D
- (iv) The appellant's action against the first and second respondents is statute barred by virtue of s. 202 of the Land Code (Cap 81) of Sarawak. E
- (v) Lot 86 which encompassed in the third parcel was formerly part of Sempadi Forest Reserve and ceased to be a forest reserve on 7 August 1964 *vide* Government Gazette Notification No. Swk L.N. 145. F

The Appeals

[9] On the facts of the case and the evidence put to the fore the learned Judicial Commissioner made his finding as follows ie:

that the plaintiff has not adduced any evidence of any customary practice that enables a native holding land under NCR to 'transfer' his land or rights thereunder to a third party. G

[10] Apparently, the basis of this finding by the learned Judicial Commissioner is derived from the concept of "occupation by a native of land is to sustain his native rights thereto, so as to occupy the same as licensee of the government" which is in line with s. 5(2) of the Land Code (Cap. 81) of Sarawak which provides and spells out methods by which native customary rights may be acquired. Conceptually a native having lawfully acquired H I

- A NCR over land occupying the same as licensee of the government must occupy the said land continuously, meaning that he cannot part with possession thereof.
- B [11] In *Sumbang Sekam v. Engkarong Ajah* [1958] SCR 95, the Native Court of Appeal held that “individual customary rights are not transferable by sale or otherwise for value”. In another case, *Sat anak Akum & Anor v. Randong Charareng* [1958] SCR 104, the same court again held that land held by a Dayak individual under NCR cannot be transferred.
- C [12] The above decisions by the Native Court of Appeal which is the highest court in the Native Court system in Sarawak is the reflection of the ‘adat’ and custom or body of customs to which the law of Sarawak gives effect. In this regard there are regulations and administrative procedures laid down by the government
- D pertaining to disposal of NCR land. They are to be found in secretariat circular No. 12/1939. The spirit and philosophy of this circular is “to record and protect these customary rights and to prevent the various communities from impoverishing themselves by disposing lightly of their rights to others, whether alien or natives”.
- E (para. 1 of the circular).
- F [13] Our attention is also drawn to other provisions of the said circular which to our mind are highly pertinent and relevant to the issues at hand. Paragraph 3(iii) states that “Individual ownership is limited by customary rights of the community to a say in the matter of disposal to anyone outside the community”.
- G [14] Then there is also para. 9 which makes provision for setting up of a village council that is to be appointed as circumstances permit to represent each community. The duties of this village council as spelt out in para. 10 *inter alia*:
- To approve or disallow all proposed voluntary dealings in land by members of the community subjected to the usual right of appeal.
- H [15] By the above mentioned provisions, it is to be understood that transfer of land held under native customary tenure must be approved by the village council. Talking about “voluntary dealings” as mentioned in para. 10 above, surely the village council in considering whether or not to approve any transfer by members
- I of a native community would require some form of documentary proof that would support the dealing.

[16] The learned State Legal Counsel drew our attention to the fact that the appellant in this appeal is from Julau and his parents came from the same place. However, the land claimed by the appellant to have been acquired by way of sale and purchase agreements are at Sungai Agas, 13th Mile, Matang, Kuching. According to learned State Legal Counsel further this is a case of an Iban from a community in Julau (Central Sarawak) acquiring native customary rights from a community in Kuching District (Western Sarawak). The question that would seem to arise from this scenario is whether the customary law of the Iban Community in any area/district allow for sale or transfer of individual plot of land held under NCR, by sale and purchase agreements to another individual who is from outside the area/district *albeit* he is also an Iban. The answer to this is to be found in the aforementioned case of *Sumbang anak Sekam v. Engkarong anak Ajah (supra)* which had ruled that individual customary rights are not transferable by sale or otherwise for value.

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[17] In the same case the Native Court of Appeal went on further to rule that if any purported dealing in land by way of a sale and purchase agreement is declared to be invalid, in such a case then and would revert to the longhouse and come under the disposition of the “tuai rumah”.

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[18] In *Gawon anak Gudun & 2 Ors v. G Gujal & Rose (f) Buso* (O.S No. 25 of 1977), which was reported in Land Cases (1969-1987) at p. 124, Tan Chiaw Thong J held:

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In my judgment, having regard to the relevant decisions in the cases of *Sumbang anak Sekam v. Engarong anak Ajah* [1958] S.C.R. p. 95 and *Sat anak Akum & Another v. Randong anak Charareng* [1958] S.C.R. p. 104, it is clear that such a sale is legally ineffectual and not legally recognised ... In the light of these two authorities, it seems clear and I hold that the purported sale and transfer of native customary rights over the said land by Lang anak Nyalong to the 2nd respondent for value is not legally effectual. Hence, in my view, the 2nd respondent cannot claim any rights over the said land by virtue of such purported sale and transfer.

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[19] Further perusal of the learned Judicial Commissioner’s grounds of judgment and submission by both counsel, it is also our understanding that by a concept and system called “Tusun Tunggu” in so far as it relates to Iban custom there are only two

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A modes by which customary rights may be acquired. One is by felling a virgin jungle and planting of crops thereon so as to create “temuda”, while the other is by gift or inheritance.

B [20] From the above, it is clear to us that in the light of what had been decided by the Native Court, this court is legally bound to take judicial notice of the customary law that have been clearly and consistently established by the aforementioned judgment of the Native Court of Appeal in Sarawak with the bottom line that individual customary rights created or acquired by natives through the practice of their customs cannot be transferred for value or to someone from outside their community or district.

C [21] There is, however, one other interesting and pertinent point raised in the submission of the parties that merits consideration by this court. It is whether this court has jurisdiction to change native customary law in order to be in abreast with the changing of time and the reality of the situation so as to avoid injustice, unreasonableness and oppression.

D [22] In this regard our attention is also drawn to art. 121 of the Federal Constitution which provides *inter alia* that “the High Courts and inferior courts shall have such jurisdiction as may be conferred by or under federal law”.

E [23] We are also referred to Items 2(a) and (b) of List II (State List) of the Ninth Schedule of the Federal Constitution and Item 13 of List IIA (Supplement to State List for States of Sabah and Sarawak) read with arts. 74(2) and 95B(1)(a) of the same. By virtue of these provisions, only the State Legislature of Sarawak can legislate on (a) Native Reservations and Land Tenure, and (b) Native Law and Customs, including *inter alia*, the determination of native law and customs.

F [24] In the light of the above, it is our view that we are unable to consider the appellant’s proposition that the court has the power to change native customary law. The power lies with the State Legislature of Sarawak.

G [25] Quite apart from the merit of the substantive appeal, learned counsel for the appellant before us also raised issues on points of procedure. Learned counsel complained that the cross-examination of witnesses in the trial was not done in accordance with established procedure. It was submitted that the learned

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Judicial Commissioner was wrong in allowing the trial to be conducted on the basis of written cross-examination of witnesses and such procedure contravened the established civil procedure on the conduct of such cases. This, according to counsel further has led to miscarriage of justice.

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[26] On this issue we had perused the grounds of judgment of the learned Judicial Commissioner and spotted the following passage, that reads:

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Preliminaries:

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At the commencement of the action, parties have agreed that the case can be heard by way of (i) witness statement for examination in draf, (ii) preliminary cross-examination by witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination), (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination.

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[27] In the light of the above passage, we hold that the appellant's complaint in this regard is a non-issue as parties have clearly agreed to the mode of the of the trial and manner in which evidence is to be adduced.

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[28] For reasons stated above we see no merit in the appellant's appeal, as such we dismissed it with costs of RM10,000 payable to the first and second respondents.

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[29] As for the appeal against the third and fourth respondents, by reason of our decision in respect of the first and second respondents above, we hold that such appeal is groundless and without merit, and therefore dismissed it with costs of RM5,000 to each of the respondents.

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